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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 620

HARRIEL L. FOWLER, PETITIONER

vs.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1956

Certiorari granted December 10, 1956

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO......

FREDERICK H. WILKINSON, WARDEN
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

Appellant,

vs.

HARRIEL L. FOWLER

Appellee.

NO. 5385
CIVIL ACTION

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JAMES W. DORSEY, United States Attorney, Atlanta, Georgia.

HARVEY H. TYSINGER, Assistant United States Attorney, Atlanta, Georgia.

C. F. CORDES, Colonel, JAGC, Third Army, Fort McPherson, Georgia.

JOHN A. SMITH, JR., Captain, JAGC, Third Army, Fort McPherson, Georgia.

Attorneys for Appellant.

HENLEY, EPSTEIN, OWENS, CHANCEY & BRAGG; LEON S. EPSTEIN, 1630 Fulton National Bank Bldg., Atlanta 3, Georgia.

Attorneys for Appellee.

INDEX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PETITION FOR WRIT OF HABEAS CORPUS

No. 5385
Civil Action

The petition of HARRIEL L. FOWLER, hereinafter referred to as petitioner, against W. H. HARDWICK, Warden, UNITED STATES PENITENTIARY, respectfully shows to the court the following facts to wit:

1.

That the petitioner is being restrained of his liberty by the respondent who is the warden of the United States Penitentiary located in Atlanta, Georgia.

2.

That said detention is taking place within the jurisdiction of this court.

3.

That said petitioner is being deprived of his liberty under the authority of the United States of America in violation of his Constitutional rights as enumerated in Amendments V and VI of the United States Constitution.

4.

The petitioner shows that he was tried at Hoengsong, Korea on June 8, 1951 by General Court Martial for the

violation of the 92nd. Article of War and the 96th. Article of War.

5.

Specification One of the Charges was:

1: "In that Corporal HARRIEL L. FOWLER, Hdqrs., Hdqrs. & Service Co., 72nd. Tank Battalion, APO 248, did, at Chundong-ni, South Korea, on or about 16 March, 1951, with malice of aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or a carbine."

Specification Two of the Charges was:

2: "In that HARRIEL L. FOWLER, Hdqrs., Hdqrs. & Service Company 72nd. Tank Battalion, APO 248, did, at Chundong-ni, South Korea on or about the 16th March, 1951, forcefully and feloniously, against her will have carnal knowledge of an adult Korean female person whose name is unknown."

6.

That the petitioner pleaded not guilty to both specifications of charges and was tried on both charges simultaneously together with two co-defendants.

7.

That the evidence which was presented to the court against the petitioner was so vague, indefinite, and without proof that a conviction based thereon was ridiculous.

8.

That the petitioner would never have been convicted

had the court not been so prejudiced by the evidence presented against the other defendants which evidence, according to the record, should not have been considered against your petitioner.

9.

That the record of the trial which will be introduced in evidence shows upon its face the complete unfairness and the gross prejudice of the trial court in conducting the trial against your petitioner. Said record in its entirety shows such prejudice that any conviction based thereon would be violation of the petitioner's constitutional rights as enumerated in Amendments V and VI of the United States Constitution.

10.

On January 9th, 1951 the above General Court Martial found the petitioner guilty of murder and of attempted rape in violation of the 92nd. Article of War and the 96th. Article of War.

11.

During the Court Martial, the Law Officer instructed the court with respect to the penalty it could impose on the murder charge, but said nothing as to the penalty that might be imposed for attempted rape. At that time the penalties were, for murder, death or life imprisonment as a court-martial might direct, and for attempted rape, such punishment as a court-martial might direct, subject to a maximum of 20 years' imprisonment. Table of Maximum Punishments, Section A., Manual for Courts-Martial, United States, 1951.

12.

The court-martial, after deliberating, sentenced the petitioner to life imprisonment.

13.

It should be noted that on May 31st, 1951, the Articles of War were superceded by the Uniform Code of Military Justice, 50 U. S. C. A., Section 551 et seq., so that the substantive offenses with which plaintiff was charged were governed by the Articles but that the procedures for review of his sentence were those established by the Uniform Code.

14.

On July 3, 1951, the Commanding General of the Second Military Division, the convening authority, approved the action of the court-martial and forwarded the record to the Judge Advocate General of the Army for review by a Board of Review in his office. On January 15, 1952, the Board of Review handed down its decision. It disapproved the murder conviction for lack of evidence, but approved the attempted rape conviction and decided that 20 years' imprisonment was the appropriate punishment therefor.

On June 2, 1952, the United States Court of Military Appeals declined to consider petitioner's petition for Grant of Review U. S. vs. FOWLER, DECOSTER, ET AL, 1, U. S. C. M. A. 713. In due course your petitioner was transferred to the Penitentiary in Atlanta, Georgia where he is now confined.

16.

The petitioner shows that he is wrongfully restrained of his liberty because under all the evidence as shown by

the record of the court-martial, the petitioner was not given a fair trial under Amendments V and VI of the United States Constitution.

17.

The petitioner shows that he is wrongfully restrained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held.

18.

Petitioner further states that he is a citizen of the United States and is without funds to prosecute his petition for Habeas Corpus and desires from the Court permission to proceed in *forma pauperis*.

19.

Petitioner further states that he is completely innocent of the crimes charged to him by the courts-martial and of which he was wrongfully convicted.

Wherefore, your petitioner prays that a rule nisi issue requiring the respondent to show cause why said Writ of Habeas Corpus should not be issued, and prays that the respondent be ordered to release the petitioner from further custody, and further prays that he be allowed to proceed in *forma pauperis*.

This 21st day of October, 1955.

Henley, Epstein, Owens, Chancey & Bragg
Leon S. Epstein
By: /s/ Leon S. Epstein

1630 Fulton National Bank Building

Atlanta, Georgia
CY. 5929.

AFFIDAVIT

GEORGIA, FULTON COUNTY.

Personally appeared before the undersigned attesting officer duly authorized by law to administer oaths, HARRIEL L. FOWLER, who states under oath that he is the petitioner in the foregoing suit and the facts stated therein are true to the best of his knowledge and belief.

/s/ Harriel L. Fowler
HARRIEL L. FOWLER

Sworn to and subscribed before me
this 18th day of October, 1955.

/s/ D. B. Laughlin
Notary Public
Parole Officer. Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U. S. C. 4004)

Filed October 26, 1955
Pauper's affidavit and Rule Nisi omitted.

(TITLE OMITTED)

RESPONSE

Comes now the respondent, W. H. Hardwick, Warden, United States Penitentiary, Atlanta, Georgia, upon whom has been served an order to show cause why a writ of *habeas corpus* should not issue for the production of Harriel L. Fowler in custody as a prisoner by authority of the United States, pursuant to the sentence of a general court-martial under the following circumstances.

I.

The petitioner was lawfully enlisted in the Army of the United States in the grade of private on March 11, 1946, and remained a member of the Army of the United States until lawfully discharged, on or subsequent to June 30, 1952, pursuant to the sentence of a general court-martial (Exhibit A).

II.

On May 21, 1951, the petitioner was served with charges which alleged that on or about March 16, 1951, at Chu-dong-ni, South Korea, the said Harriel L. Fowler did, in violation of Article of War 92 (formerly 10 U. S. C. 1564), murder an adult Korean female person whose name is unknown (Exhibit B).

III.

On May 21, 1951, the petitioner was served with charges which alleged that on or about March 16, 1951, at Chu-dong-ni, South Korea, the said Harriel L. Fowler did, in violation of Article of War 92, *supra*, rape an adult Korean female person whose name is unknown (Exhibit B).

IV

On June 8, 1951 and June 9, 1951 the said petitioner was duly arraigned and tried for these offenses before a general court-martial convened by paragraph 14, Special Orders Number 148, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated June 1, 1951 (Exhibit B).

V

On June 9, 1951, the said Harriel L. Fowler was convicted of murder in violation of Article of War 92, *supra*,

and attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568) by the said general court-martial, and sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life (Exhibit B).

VI

Under the provisions of the Uniform Code of Military Justice, Article 61 (50 U. S. C. 648), the convening authority referred the record of petitioner's trial to his staff judge advocate for review and the said staff judge advocate, after a review of the said record of trial, submitted his written opinion thereon to the convening authority in which he found that the sentence imposed upon the petitioner was correct in law and fact, and recommended that the sentence be approved.

VII

On July 3, 1951, the sentence adjudged by the general court-martial was approved by the convening authority. The results of the petitioner's trial and the initial action of the convening authority were promulgated by General Court-Martial Orders Number 44, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated July 3, 1951 (Exhibit B).

VIII

Pursuant to the Uniform Code of Military Justice, Article 66, (50 U. S. C. 653), a Board of Review in the Office of The Judge Advocate General of the Army reviewed the record of trial and on January 15, 1952, approved only so much of the findings of guilty as found

the petitioner guilty of attempted rape in violation of Article of War 96, *supra*, and only so much of the sentence as included dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for twenty years. The said Board of Review held that the findings and sentence, as thus approved, were correct in law and fact, and affirmed the findings and sentence as thus modified (CM 347258, Fowler, et al, 2 CMR 336).

IX

Pursuant to the provisions of the Uniform Code of Military Justice, Article 67 (*b*) (3) and (c) (50 U. S. C. 654), the petitioner, through counsel, on or about April 29, 1952, filed a petition for grant of review and brief in support thereof in the United States Court of Military Appeals. On June 2, 1952, an order was issued by the said United States Court of Military Appeals denying the said petition (United States v. Fowler, et al, 1 USCMA 713, 3 CMR 151).

X

The provisions of the Uniform Code of Military Justice, Article 71 (c) (50 U. S. C. 658) having been complied with, General Court-Martial Order Number 705 was promulgated on June 30, 1952, by the Commanding Officer, Camp Cooke, California, where petitioner was then held in confinement. This order directed execution of the sentence to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for twenty years, and directed that petitioner be committed to the custody of the Attorney

General or his designated representative for classification, treatment, and service of the sentence to confinement (Exhibit A).

XI

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement as was in excess of eighteen years was remitted (Exhibit C).

XII

The respondent lawfully holds the said Harriel L. Fowler in custody under the authority and by virtue of the facts hereinbefore stated (Exhibit D).

XIII

Answering the allegations in the application of the petitioner for a writ of habeas corpus, filed with this Court October 26, 1955, the respondent admits, denies, and alleges as follows:

1. Respondent admits the allegations in paragraphs 1 and 2 of the petition.

2. Respondent denies the allegations in paragraph 3 of the petition.

3. Respondent admits the allegations in paragraph 4 of the petition with reference to Article of War 92 only, and alleges that petitioner was tried for two offenses in violation of that article and found guilty of one offense in violation of said article and of the lesser included offense of attempt to rape, in violation of the 96th Article of War.

4. Respondent admits that the charges under which the petitioner was arraigned, as shown in paragraph 5 of the petition, are substantially correct, but refers to Exhibit B of this return as shown the verbatim language of each of the specifications.

5. Respondent admits the allegations in paragraph 6 of the petition.

6. Respondent denies the allegations in paragraphs 7, 8 and 9 of the petition.

7. Respondent admits the allegations in paragraph 10 of the petition, except that the correct date of the findings of guilty is June 9, 1951, not January 9, 1951.

8. Respondent admits the allegations of paragraph 11 of the petition as to maximum punishment, but alleges further that such maximum punishment was also controlled by the provisions of paragraph 117 *c*, Manual for Courts-Martial, United States Army, 1949.

9. Respondent admits the allegations in paragraph 12 of the petition, but alleges further that the sentence included dishonorable discharge and forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

10. Respondent admits the allegations of paragraph 13 of the petition.

11. Respondent admits the allegations of paragraph 14 of the petition, except that portion of the paragraph referring to the decision as to sentence, such portion being

denied as incomplete and misleading. The decision of the Board of Review is correctly stated in Paragraph VIII of this return, *supra*.

12. Respondent admits the allegation of paragraph 15 of the petition.

13. The respondent denies the allegations of paragraph 16 and 17 of the petition.

14. The respondent is unable to admit or deny the allegations of paragraph 18 of the petition.

15. Respondent denies the allegations of paragraph 19 of the petition.

XIV

For further answer, the respondent avers:

1. The general court-martial by which the petitioner was convicted had jurisdiction over the person of the petitioner; the offense of which the petitioner was convicted was an offense over which the general court-martial had jurisdiction; and the said general court-martial, having been legally constituted, and the sentence being within the maximum authorized for the offense of which the petitioner was found guilty, as modified and affirmed by the board of review, acted within the scope of its lawful powers.

2. All sentences imposed by courts-martial under military law are entire and single. The sentence imposed by the court-martial upon the petitioner embraced the offense of attempted rape, which offense is included in the offense of rape charged, since a sentence of a court-martial is a sentence imposed for all of the offenses for which an ac-

cused person has been convicted. Such imposition of an entire and single sentence for all offenses for which an accused person may have been convicted is not a new procedure under the Uniform Code of Military Justice, the same procedure being for application under the old Articles of War (formerly 10 U. S. C. 1471-1593).

3. The law officer was under no duty, and was not requested, to instruct the court-martial with regard to the maximum punishment which could be imposed for attempted rape. No erroneous instruction was given.

4. The instruction of the law officer as to sentence was given only after the full and proper presentencing procedure required by Appendix 8 a, pages 520 and 521, *Manual for Courts-Martial, United States,* 1951, had been completed.

5. The sentence imposed upon the petitioner, having been imposed for all of the offenses for which the petitioner had been convicted, was divisible, and the board of review acted within its lawful powers in upholding the portion thereof which it approved (Uniform Code of Military Justice, Art. 66 (c)., *supra*).

6. The appropriateness of a sentence which is within the maximum authorized sentence is not within the scope of review by civil courts on *habeas corpus.*

7. The Uniform Code of Military Justice (50 U. S. C. 551-736) provides an appellate process within the military establishment to review the proceedings of courts-martial, to ferret out irregularities in the trial and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's Armed Forces.

The trial and appellate action on petitioner's case were in conformity with the said Uniform Code of Military Justice, and the *Manual for Courts-Martial, United States,* 1951 (16 Fed. Reg. 1303-1469).

8. The fairness of a trial by court-martial conducted in conformity with the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States,* 1951, and the legal sufficiency of the evidence are not within the scope of review by civil courts on *habeas corpus.*

WHEREFORE, the respondent respectfully prays this court that the order to show cause be discharged, the petition for writ of *habeas corpus* be dismissed, and the said Harriel L. Fowler remain in the custody of respondent.

/s/ James W. Dorsey
JAMES W. DORSEY
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER
Assistant United States Attorney

/s/ Clifford F. Cordes, Jr.
CLIFFORD F. CORDES, JR.
Colonel, J. A. G. C.

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.
Captain, J. A. G. C.
Counsel for Respondent.

Filed November 7, 1955.

72975

HEADQUARTERS
Camp Cooke, California

GENERAL COURT-MARTIAL 30 June 1952
ORDER NUMBER 705

In the general court-martial case of Corporal Harriel L. Fowler, RA 34 872 429, United States Army, Headquarters, Headquarters and Service Company, 72d Tank Battalion (presently confined Branch United States Disciplinary Barracks, Camp Cooke, California), the proceedings of which were promulgated in General Court-Martial Orders Number 44, Headquarters, 2d Infantry Division, APO 248, dated 3 July 1951, the findings of guilty of Specification 1 of the Charge and the Charge have been set aside. *The finding of guilty of Specification 2 of the Charge and the finding of guilty of violation of the 96th Article of War, and only so much of the sentence* as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard *labor for twenty years have been affirmed* pursuant to the Uniform Code of Military Justice, Article 66. The provisions of the Uniform Code of Military Justice, Article 71*c*, having been complied with, the sentence as thus modified will be duly executed. The forfeitures shall apply to all pay and allowances becoming due after the date of this order. A United States penitentiary, reformatory, or other such institution is designated as the place of confinement, the prisoner to be committed to the custody of the Attorney General or his designated representative for classification, treatment, and service of the sentence to confinement. (CM 347258).

BY ORDER OF COLONEL KIRBY:

OFFICIAL:

/s/ Frank L. Hopson
FRANK L. HOPSON
WOJG USA
Asst Adjutant General

WELDON B. WELLS
Lt. Col, GS
Actg Chief of Staff

DISTRIBUTION:

Y (Par 59 SR 310-110-1)

EXHIBIT A

HEADQUARTERS
2d Infantry Division
APO 248 c/o Postmaster
San Francisco, California

#72975-A

GENERAL COURT-MARTIAL ORDERS NUMBER 44

3 July 1951

Before a general court-marial which convened at Hoengsong, Korea, pursuant to paragraph 14, Special Orders No. 148, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 1 June 1951, was arraigned and tried:

Corporal Harriel L. Fowler, RA 34872429, U. S. Army, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248.

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Corporal Harriel L. Fowler, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, with malice afore-

thought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine.

Specification 2: In that Corporal Harriel L. Fowler, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, forcibly and feloniously, against her will, have carnal knowledge of an adult Korean female whose name is unknown.

PLEAS

To all Charges and Specifications: Not Guilty.

FINDINGS

Of Specification 1. Guilty.

Of Specification 2, Guilty, except the word "have," substituting therefor the words, "attempt to have"; of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge as to Specification 1, Guilty; as to Specification 2, Not Guilty, but guilty of a violation of Article of War 96.

SENTENCE

To be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. (No previous convictions considered.)

The sentence was adjudged on 9 June 1951.

ACTION

HEADQUARTERS
2d Infantry Division
APO 248 c/o Postmaster
San Francisco, California

3 July 1951

In the foregoing case of Corporal Harriel L. Fowler, RA 34872429, Headquarters, Headquarters and Service Company, 72d Tank Battalion, 2d Infantry Division, APO 248, the sentence is approved. The application of the forfeitures is deferred until the sentence is ordered into execution.

The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, accused will be transferred to Central Command, APO 503, for confinement in the United States Army Stockade, 8044th Army Unit, APO 503.

/s/ Clark L. Ruffner
/t/ CLARK L. RUFFNER
Major General, U. S. Army
Commanding

BY COMMAND OF MAJOR GENERAL RUFFNER:

RUPERT D. GRAVES
Colonel, GS
Chief of Staff

OFFICIAL:
/s/ John H. Wood
JOHN H. WOOD
WOJG, USA
Asst AG

EXHIBIT B

DEPARTMENT OF THE ARMY
Office of the Adjutant General
Washington, D. C.

(EMBLEM) In reply refer to
AGPK-CB 201 Fowler, Harriel L.
(9 Jun 54)

17 June 1954

RECEIVED
RECORD OFFICE
Jun 18, 1954
U. S. PENITENTIARY,
ATLANTA, GA.

In the case of Prisoner Harriel L. Fowler, RA 34 872 429, confined at United States Penitentiary, Atlanta, Georgia, so much of the sentence to confinement as initially promulgated in General Court-Martial Order No. 44, Headquarters, 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 3 July 1951, and as ordered into execution in General Court-Martial Order No. 705, Headquarters, Camp Cooke, California, dated 30 June 1952, as is in excess of eighteen years, is remitted.

BY ORDER OF THE SECRETARY OF THE ARMY:

(Name illegible)
Adjutant General

EXHIBIT C

Record Form No. 1
Rev. Jan. 1, 1952

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

SENTENCE DATA RECORD

U. S. Penitentiary, Atlanta, Ga.
INSTITUTION

6-21-54: Corrected ARMY REMISSION
DATE

M I L I T A R Y

INST. NAME Harriel L. Fowler TRUE NAME Harriel Lee Fowler NO. 72975

ALIAS RACE White BIRTHDATE 8-26-24

RESIDENCE Dorsey, Mississippi AGE 26

DATE	DISTRICT	SENTENCE			OFFENSE
6-9-51	ARMY-Korea	20 Years	FINE None / COSTS	COM. PD.	Assault to Rape.
		GCMO NO. 44	FINE / COSTS	COM. PD.	
		ASN RA 34 872 429	FINE / COSTS	COM. PD.	
			FINE / COSTS	COM. PD.	

TOTAL SENTENCE 18 years.

SENTENCE BEGINS	June 9, 1951			
As HO-L COMMITTED TO FED. INST.	Oct. 20, 1952 Nov. 8, 1952			
ELIGIBLE FOR PAROLE	June 8, 1957	June 8, 1957		
RATE PER MONTH GOOD TIME	10 Days	10 Days		
TOTAL GOOD TIME POSSIBLE	2160 Days	2160 Days		
EXPIRES WITH GOOD TIME	July 10, 1963	July 10, 1963		
EGT - 33 Days EXP. WITH (EXTRA) (PART) G. T.	June 7, 1963	June 7, 1963		
EXPIRES FULL TERM	June 8, 1969	June 8, 1969	MD	

(TITLE OMITTED)

PETITIONER'S TRAVERSE TO RESPONSE

Comes now the petitioner and files this his traverse to the respondent's response and shows:

1.

Petitioner admits all of Paragraph 1 excepting the words "lawfully discharged" which he contends he was not.

2.

Petitioner admits Paragraphs 2, 3, 4, 5, 6, 7, 9 and 11.

3.

Petitioner denies as alleged in the response Paragraphs 8, 10, and 12.

4.

Petitioner does not answer Paragraph 13 of the response because it is traverse to allegation in the original petition.

5.

Petitioner states Paragraph 14 is merely an argument of law which has no application in the case because all of said contentions were dealt with and disapproved in the findings of the United States Court of Appeals in the case of Carl Andrew DeCoster vs. P. J. Madigan 223 Federal 2nd., Page 906.

WHEREFORE, the petitioner prays that his writ of Habeas Corpus do issue and it be ordered that he be released from custody.

This 18 day of November, 1955.

HENLEY, EPSTEIN, OWENS, CHANCEY & BRAGG
Leon S. Epstein
Attorneys for Petitioner
By: /s/ Leon S. Epstein
1630 Fulton National Bank Bldg.
Atlanta 3, Georgia
CY. 5929
Acknowledgment of service omitted.
Filed Nov. 18, 1955

(TITLE OMITTED)

ORDER TO RELEASE PRISONER UPON PAYMENT OF FIVE THOUSAND DOLLARS BOND TO ANSWER THE FINAL JUDGMENT IN THIS CASE

As this case involves the same facts referred to in the case of *De Coster* vs. *Madigan,* decided by the Seventh Circuit Court of Appeals, *22 F. 2d, 906,* they will not be here repeated.

After hearing able arguments from both sides and a study of the authorities this Court feels compelled to agree with the majority opinion in the case above cited and to order release of the prisoner. However, the Court will require a bond of Five Thousand ($5,000.00) Dollars to answer to the final judgment in this case upon appeal.

This Court has read with a great deal of interest the comprehensive and thoughtful minority opinion in the above stated case, also the equally well-considered opinion by Judge Frederick V. Follmer, United States

District Judge for the Middle District of Pennsylvania, in the case of *Chester E. Jackson* vs. *George W. Humphrey, Warden, Habeas Corpus No. 282.* Both opinions express in clear and forceful language reasons why this applicant should be detained in custody. Under the record of the military court it appears he should be punished, but it is not for this Court on habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with intent to rape that sentence would now be good, the murder conviction being set aside. This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years. It is therefore ordered that the prisoner be released upon posting bond in the sum of Five Thousand ($5,000.00) Dollars, to be approved by the Clerk of this Court, to answer the final judgment in this case.

This the 27th day of December, 1955.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed December 27, 1955

(TITLE OMITTED)

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT

Notice is hereby given, with the authority of the Attorney General of the United States, that the Warden, United States Penitentiary, Atlanta, Georgia (formerly

W. H. Hardwick, deceased, now T. J. Gough, Acting Warden), respondent above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment ordering release of petitioner upon payment of $5,000 bond pending final judgment upon appeal entered in this action on December 27, 1955.

This 19th day of January, 1956.

/s/ James W. Dorsey
JAMES W. DORSEY
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER
Assistant United States Attorney

/s/ C. F. Cordes
C. F. CORDES
Colonel, J. A. G. C.

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.
Captain, J. A. G. C.
Counsel for Respondent

Filed Jan. 19, 1956

(TITLE OMITTED)

ORDER SUBSTITUTING NAME OF WARDEN

The foregoing agreed statement having been read and considered, the same is approved.

IT IS HEREBY ORDERED that the name of FREDERICK H. WILKINSON, WARDEN, be substituted and used in lieu of any other names that appear in the pleadings as Warden.

This 17th day of February, 1956.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed Feb. 17, 1956

AGREED STATEMENT OF APPEAL

I

STATEMENT OF AGREEMENT

Come now the respondent-appellant herein, Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased; now T. J. Gough, Acting Warden), and Harriel L. Fowler, petitioner-appellee, pursuant to Rule 76 of the Federal Rules of Civil Procedure, and agree on the statement herewith following (Part II below) as the record on appeal.

II

STATEMENT OF ESSENTIAL FACTS AND PROCEEDINGS

The appellee, who was then a corporal in the United States Army, was convicted, in a common trial with two other soldiers, by a properly constituted general court-martial in Korea on June 9, 1951, of premeditated murder, in violation of Article of War 92 (formerly 10 U. S. C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568). The alleged offenses were committed on an adult Korean female.

The findings of guilty as announced by the court with respect to appellee were as follows:

> "PRES: Corporal Harriel L. Fowler, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote

was taken concurring in each finding of guilty, finds you:

Of Specification 1, guilty.

Of Specification 2, guilty, except the word "have," substituting therefor the words, "attempt to have;" of the excepted word, not guilty, of the substituted words, guilty.

Of the charge as to specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96" (Record of trial, at p. 53).

Specification 1 alleged the offense of premeditated murder. Specification 2, as modified by the above findings, alleged the offense of attempted rape.

After the court's findings as to both offenses were announced, the law officer gave the court the following instruction:

"LO: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, 'Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct.' The court will be closed" (Record of trial, at p. 56).

Thereafter, on the same date, the court sentenced the appellee as follows:

"PRES: Corporal Fowler it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences you to be dishonor-

SENTENCE BEGINS	June 9, 1951				
As HO-L COMMITTED TO FED. INST.	Oct. 20, 1952 Nov. 8, 1952				
ELIGIBLE FOR PAROLE	June 8, 1957	June 8, 1957			
RATE PER MONTH GOOD TIME	10 Days	10 Days			
TOTAL GOOD TIME POSSIBLE	2160 Days	2160 Days			
EXPIRES WITH GOOD TIME	July 10, 1963	July 10, 1963			
EGT - 33 Days EXP. WITH (EXTRA) (PART) G. T.	June 7, 1963	June 7, 1963			
EXPIRES FULL TERM	June 8, 1969	June 8, 1969 MD			
FULL TERM LESS 180 DAYS	Dec. 10, 1968	Dec. 10, 1968			
SENTENCE CHANGED	xxxxxxxxx	June 17, 1954			
BASIS FOR CHANGE	xxxxxxxxx	Army Clemency			
NEW TERM	xxxxxxxxx	18 Years			

GOOD TIME FORFEITED

DATE	AMOUNT
4-8-53	60 SGT (SUSPENDED)

GOOD TIME WITHHELD

DATE	AMOUNT	DATE	AMOUNT

GOOD TIME RESTORED

DATE	AMOUNT	DATE	AMOUNT

ACTIONS: U. S. BOARD OF PAROLE

DATE	NO APPL.	FORTH.	EFFECTIVE	RELEASED	DEN.	CONT.	C. R.	WARRANT	REVOKED	DISCH'GED

RELEASES AND RECOMMITMENTS OTHER THAN PAROLE AND C.R.

DATE	METHOD

EXHIBIT D

ably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life" (Record of trial, at p. 56).

The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentence on July 3, 1951.

Pursuant to Article 66, Uniform Code of Military Justice (50 U. S. C. 653), the record of trial was reviewed by a board of review in the office of The Judge Advocate General of the Army. On January 15, 1952, the board of review, having determined that the conviction for murder was not supported by the evidence, held and took action as follows (CM 347258, Fowler, et al, 2 CMR 345, 346):

> "By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at labor for life are improper. Under the vicious circumstances of this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.
>
> "*Action by the Board*
>
> "For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge [premeditated murder] are incorrect in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War [attempted rape] are cor-

rect in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such findings, except as thus set aside, and sentences, as modified, are

Affirmed." (Portion in brackets supplied.)

A petition for grant of review by the United States Court of Military Appeals was denied by that court on June 2, 1952 (3 CMR 151, 1 USCMA 713).

General Court-Martial Order No. 705, directing execution of the sentence, was published at Headquarters Camp Cooke, California, on June 30, 1952.

The appellee was placed in custody of the appellant, Warden, United States Penitentiary, for the purpose of execution of the sentence to confinement.

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement at hard labor as was in excess of eighteen years was remitted.

On October 26, 1955, the appellee filed a petition for habeas corpus in *forma pauperis* in the United States District Court, Northern District of Georgia, Atlanta Division, alleging, among other things, the following:

"17.

"The petitioner shows that he is wrongfully re-

strained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held."

Rule *nisi* issued, and a return and traverse to the return were filed.

Prior to the time the above quoted petition was filed, the above stated allegation had not been suggested or raised by the appellee or counsel in any proceedings before any tribunal.

A hearing was held before the Honorable Frank A. Hooper, Judge in the District Court of the United States for the Northern District of Georgia, Atlanta Division, on December 19, 1955. At said hearing, as to the above quoted allegation, the appellee, by counsel, relied on the majority opinion in *DeCoster* v. *Madigan*, 223 F. 2d 906 (7th Cir., 1955). *Carl Andrew DeCoster*, the appellant in the cited cases, was tried in common trial by the same court-martial as appellee in this case, and the decision of the district court judge denying release was reversed on an issue substantially identical to that made by the appellee here in the above quoted paragraph 17 of his petition for habeas corpus. The appellant herein relied on the minority opinion of the cited case, and on the unreported decision of Judge Follmer, United States District Judge for the Middle District of Pennsylvania, in the case of *Chester C. Jackson* v. *George W. Humphrey*, Warden, Habeas Corpus No. 282 (135 Fed. Supp. 776), denying release to Jackson, who was the third soldier tried in common with appellee in this case.

Thereafter, in the United States District Court for the

Northern District of Georgia, Atlanta Division, the following judgment issued in this case:

(TITLE OMITTED)

"ORDER TO RELEASE PRISONER UPON PAYMENT OF FIVE THOUSAND DOLLARS BOND TO ANSWER THE FINAL JUDGMENT IN THIS CASE

"As this case involves the same facts referred to in the case of *DeCoster* vs. *Madigan*, decided by the Seventh Circuit Court of Appeals, 223 F. 2d, 906, they will not be here repeated.

"After hearing able arguments from both sides and a study of the authorities this Court feels compelled to agree with the majority opinion in the case above cited and to order release of the prisoner. However, the Court will require a bond of Five Thousand ($5,000.00) Dollars to answer to the final judgment in this case upon appeal.

"This Court has read with a great deal of interest the comprehensive and thoughtful minority opinion in the above stated case, also the equally well-considered opinion by Judge Frederick V. Follmer, United States District Judge for the Middle District of Pensylvania, in the case of *Chester E. Jackson* vs. *George W. Humphrey, Warden, Habeas Corpus No.* 282. Both opinions express in clear and forceful language reasons why this applicant should be detained in custody. Under the record of the military court it appears he should be punished, but it is not for this Court on habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with intent to rape that sentence would now be good, the murder conviction being set aside. This Court cannot assume that he had not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years. It is therefore ordered that the prisoner be released upon posting bond in the

sum of Five Thousand ($5,000.00) Dollars, to be approved by the Clerk of this Court, to answer the final judgment to this case.

"This the 27th day of December, 1955.

"Frank A. Hooper
United States District Judge."

On January 19, 1956, respondent below filed the following notice of appeal:

(TITLE OMITTED)

"NOTICE OF APPEAL TO COURT OF APPEALS FOR THE FIFTH CIRCUIT"

"Notice is hereby given, with the authority of the Attorney General of the United States, that the Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased, now T. J. Gough, Acting Warden), respondent above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment ordering release of petitioner upon payment of $5,000 bond pending final judgment upon appeal entered in this action on December 27, 1955.

"This 19th day of January, 1956."

It is further stipulated and agreed that the record of trial by court-martial and allied papers, introduced in evidence at the hearing on December 19, 1955, as "Respondent's Exhibit No. 1," said record being a properly authenticated photostatic copy from the files of the Department of the Army, is too voluminous and would be impossible to reproduce without inconvenience and additional expense to the government, and that such record be designated and forwarded to the Court of Appeals for the Fifth Circuit as a physical exhibit, for such inspection as the members of the Court of Appeals for the Fifth Circuit may desire to make, under the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure.

III

STATEMENT OF POINTS RELIED UPON BY APPELLANT ON APPEAL

The appellant will rely on the following points on appeal:

(1) The district court erred in considering, and was without jurisdiction to review, on *habeas corpus*, a sentence authorized by, and imposed in accordance with, the Uniform Code of Military Justice.

(2) The district court erred in determining that, upon conviction of a soldier by a court-martial for murder and attempted rape, a sentence to life imprisonment does not necessarily include an appropriate sentence for attempted rape.

(3) The district court erred in determining that a sentence to twenty years imprisonment for attempted rape was illegally affirmed by a board of review when, following conviction of a soldier by a court-martial for murder and attempted rape and sentence to dishonorable discharge, total forfeitures, and life imprisonment, the board of review set aside the conviction for murder and found that only the conviction for attempted rape was correct in law and fact.

This the 17th day of February, 1956.

/s/ James W. Dorsey
JAMES W. DORSEY,
United States Attorney

/s/ Harvey H. Tysinger
HARVEY H. TYSINGER,
Assistant United States Attorney

/s/ C. F. Cordes
C. F. CORDES,
Colonel, JAGC

/s/ John A. Smith, Jr.
JOHN A. SMITH, JR.,
Captain, JAGC
Counsel for Respondent-
Appellant

/s/ Harriel L. Fowler
HARRIEL L. FOWLER,
Appellee
HENLEY, EPSTEIN, OWENS,
CHANCEY & BRAGG
LEON S. EPSTEIN,
Attorneys for Petitioner-
Appellee
By /s/ Leon S. Epstein

Filed Feb. 17, 1956

ORDER DESIGNATING AGREED STATEMENT AND PHYSICAL EXHIBIT ON APPEAL

The foregoing agreed statement having been read and considered the same is approved.

IT IS ORDERED that the same be certified to the Court of Appeals for the Fifth Circuit as the record on appeal in the above stated case, under the provisions of Rule 76 of the Federal Rules of Civil Procedure, together with the Petition, Response, Traverse and Order To Release Prisoner Upon Payment of Five Thousand Dollars Bond to Answer the Final Judgment in This Case.

IT IS FURTHER ORDERED that Respondent's Exhibit No. 1 be designated as a physical exhibit and that same be forwarded with the record on appeal, in lieu of printing said exhibit and incorporating it as a part of the printed record, under the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Respondent's Exhibit No. 1 be returned to the Clerk of the United States District Court for the Northern District of Georgia with the mandate from the Court of Appeals for the Fifth Circuit.

This 17th day of February, 1956.

/s/ Frank A. Hooper
FRANK A. HOOPER
United States District Judge

Filed Feb. 17, 1956

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA }
} SS:
NORTHERN DISTRICT OF GEORGIA }

I, F. L. Beers, Clerk of the United States District Court in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 32 pages contain a true, full, complete and correct copy of the original record and all proceedings (except respondent's exhibit #1) in the matter of

HARRIEL L. FOWLER
Petitioner

vs.

F. H. WILKINSON, Warden
United States Penitentiary
Atlanta, Georgia
Respondent

Civil Action 5385

as specified in the designation of contents of record herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Atlanta, Georgia.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court at Atlanta, Georgia, this 24th day of February, A.D., 1956.

F. L. BEERS
Clerk, United States District Court
Northern District of Georgia
By /s/ J. L. Moore
J. L. MOORE
Deputy Clerk

(SEAL)

39 In the United States Court of Appeals for the Fifth Circuit

Minute entry of Argument and Submission—May 23, 1956

[Omitted in printing.]

* * * * * *

40 In the United States Court of Appeals for the Fifth Circuit

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No. 15967

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HARRIEL L. FOWLER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[File endorsement omitted.]

Before RIVES, CAMERON and BROWN, *Circuit Judges.*

Opinion—(June 27, 1956).

PER CURIAM: The appellee and two other soldiers, DeCoster and Jackson, were convicted by a general courtmartial in Korea, of premeditated murder, in violation of Article of War 92 (formerly 10 U. S. C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U. S. C. 1568) both offenses having allegedly been committed on an adult Korean female at Chudong-ni, South Korea, on March 16, 1951.

41 On writ of habeas corpus, DeCoster, apparently the most guilty one of the three, has since been discharged by the Seventh Circuit, Judge Finnegan dissenting. *DeCoster* v. *Madigan*, 7th Cir., 223 F. 2d. 906. On the other hand, Jackson's petition for habeas corpus was later denied by the district court, *Jackson* v. *Humphrey*, M. D. Pa., 135 F. Supp. 776, and

its judgment was affirmed by the Third Circuit on May 31, 1956, *Jackson* v. *Taylor*, No. 11,808, 3d Cir., m/s. The present petition was considered by the district court after the decision of the Seventh Circuit and before that of the Third, and the district court followed the majority opinion of the Seventh Circuit. The facts and the law have been so adequately discussed in the cases previously reported, that we refrain from stating our reasoning further than to say that, after a careful study of the record and briefs and consideration of the oral argument, we are in full accord with the dissenting opinion of Circuit Judge Finnegan in *DeCoster* v. *Madigan*, *supra*, the opinion of District Judge Follmer in *Jackson* v. *Humphrey*, *supra*, and the opinion of Circuit Judge Hastie in *Jackson* v. *Taylor*, *supra*.

The judgment is, therefore, reversed and judgment here rendered denying the petition for writ of habeas corpus.

REVERSED AND RENDERED.

42 In United States Court of Appeals for the Fifth Circuit

No. 15967.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

HARRIEL L. FOWLER

Minute entry of Judgment—June 27, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be; and the same is hereby, reversed and judgment here rendered denying the petition for writ of habeas corpus.

* * * * * *

43 [Clerk's Certificate to foregoing transcript omitted in printing.]

* * * * * *

No. 285 Misc. —, October Term, 1956

[Title omitted.]

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Order allowing certiorari—December 10, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the gross sentence question. The case is transferred to the appellate docket as No. 620 and placed on the summary calendar and assigned for argument immediately following No. 234 Misc.

Question Presented

Where, under the particular circumstances here involved, a soldier who has been convicted by a general court-martial of premeditated murder and attempted rape and has received a sentence of life imprisonment on the conviction for the premeditated murder and an Army Board of Review later reverses the conviction on the murder charge, whether the action of the Army Board of Review, in deciding upon a sentence of twenty years imprisonment for the remaining charge of attempted rape, constitutes an original imposition of sentence which is beyond the power and authority of the Board of Review as said sentence was never considered by the trial court.

Statement of the Case

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit reversing the district court's grant of a writ of habeas corpus challenging the validity of a twenty-year sentence of imprisonment imposed upon him by an Army Board of Review for a crime of attempt to commit rape. The background and essential facts of this case are contained in the following agreed statement (R. 26) as submitted to the Court of Appeals for the Fifth Circuit and respondent's Exhibit 1 which is the complete court-martial proceedings.

Come now the respondent-appellant herein, Warden, United States Penitentiary, Atlanta, Georgia (formerly W. H. Hardwick, deceased; now T. J. Gough, Acting Warden), and Harriel L. Fowler, petitioner-appellee, pursuant to Rule 76 of the Federal Rules of Civil Procedure, and agree on the statement herewith following as the record on appeal.

The appellee, who was then a corporal in the United States Army, was convicted, in a common trial with two

other soldiers, by a properly constituted general court-martial in Korea on June 9, 1951, of premeditated murder, in violation of Article of War 92 (formerly 10 U.S.C. 1564), and of attempted rape, in violation of Article of War 96 (formerly 10 U.S.C. 1568). The alleged offenses were committed on an adult Korean female.

The findings of guilty as announced by the court with respect to appellee were as follows:

> "PRES: Corporal Harriel L. Fowler, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:
>
> Of Specification 1, guilty.
>
> Of Specification 2, guilty, except the word "have," substituting therefor the words, "attempted to have;" of the excepted word, not guilty, of the substituted words, guilty.
>
> Of the charge as to specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96" (Record of trial, at p. 53).

Specification 1 alleged the offense of premeditated murder. Specification 2, as modified by the above findings, alleged the offense of attempted rape.

After the court's findings as to both offenses were announced, the law officer gave the court the following instruction:

> "LO: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, 'Any person subject to Military

law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct.' The court will be closed" (Record of trial, at p. 56).

Thereafter, on the same date, the court sentenced the appellee as follows:

"PRES: Corporal Fowler, it is my duty as president of this court to inform you that the court in closed session and upon secret ballot, three-fourth of the members present at the time the vote was taken concurring, sentences you to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life" (Record of trial, at p. 56).

The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentence on July 3, 1951.

Pursuant to Article 66, Uniform Code of Military Justice (50 U.S.C. 653), the record of trial was reviewed by a board of review in the office of The Judge Advocate General of the Army. On January 15, 1952, the board of review, having determined that the conviction for murder was not supported by the evidence, held and took action as follows (CM 347258, Fowler, et al. 2 CMR 345, 346):

"By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at labor for life are improper. Under the vicious circumstances of this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.

"*Action by the Board*

"For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge (premeditated murder) are incorrect in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War (attempted rape) are correct in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such findings, except as thus set aside, and sentences, as modified, are

Affirmed." (Portion in brackets supplied.)

A petition for grant of review by the United States Court of Military Appeals was denied by that court on June 2, 1952 (3 CMR 151, 1 USCMA 713).

General Court-Martial Order No. 705, directing execution of the sentence, was published at Headquarters Camp Cooke, California, on June 30, 1952.

The appellee was placed in custody of the appellant, Warden, United States Penitentiary, for the purpose of execution of the sentence to confinement.

By order of the Secretary of the Army on June 17, 1954, so much of the sentence to confinement at hard labor as was in excess of eighteen years was remitted.

On October 26, 1955, the appellee filed a petition for habeas corpus in *forma pauperis* (R. 1) in the United States

District Court, Northern District of Georgia, Atlanta Division, alleging, among other things, the following:

"17.

"The petitioner shows that he is wrongfully restrained of his liberty because the Board of Review was not vested with any authority to give the petitioner a 20 year sentence and same is a void commitment under which the petitioner may not legally be held."

Rule *nisi* issued, and a return (R. 6) and traverse (R. 21) to the return were filed.

Prior to the time the above quoted petition was filed, the above stated allegation had not been suggested or raised by the appellee or counsel in any proceedings before any tribunal.

A hearing was held before the Honorable Frank A. Hooper, Judge in the District Court of the United States for the Northern District of Georgia, Atlanta Division, on December 19, 1955. At said hearing, as to the above quoted allegation, the appellee, by counsel, relied on the majority opinion in *DeCoster* v. *Madigan,* 223 F. 2d 906 (7th Cir., 1955). Carl Andrew DeCoster, the appellant in the cited cases, was tried in common trial by the same court-martial as appellee in this case, and the decision of the district court judge denying release was reversed on an issue substantially identical to that made by the appellee here in the above quoted paragraph 17 of his petition for habeas corpus. The appellant herein relied on the minority opinion of the cited case, and on the unreported decision of Judge Follmer, United States District Judge for the Middle District of Pennsylvania, in the case of *Chester C. Jackson* v. *George W., Humphrey, Warden,* Habeas Corpus No. 282 (135 Fed. Supp. 776), denying release to Jackson, who was

the third soldier tried in common with appellee in this case."

The United States District Court for the Northern District of Georgia, on December 27, 1955, in an unreported decision, issued a judgment (R. 32) granting the writ of habeas corpus and ordered the petitioner released.

On January 19, 1956, respondent filed a notice of appeal (R. 34) to the United States Court of Appeals for the Fifth Circuit. On June 27, 1956, the Court of Appeals, in a per curiam decision (R. 39), reversed the district court, 234 F. 2d 615. On September 25, 1956, the petitioner filed a petition for writ of certiorari with this Court. On December 10, 1956, this Court granted certiorari limited to the gross sentence question (R. 41).

The case is now before this Court in order to correct the alleged errors affecting the rights of this petitioner and to reconcile the conflicts of the decision of the United States Court of Appeals for the Fifth Circuit with the decision of the United States Court of Appeals for the Seventh Circuit in the case of *DeCoster* v. *Madigan*, 223 F. 2d 906.

Argument

The petitioner and two others, all members of the Armed Forces at the time, were jointly tried and convicted on June 9, 1951 by a general court-martial on charges of premeditated murder and attempted rape of a Korean woman on or about March 16, 1951. With reference to one of the foregoing three co-defendants, the lower court said in *Wilkinson* v. *Fowler*, (C.A. 5, 1956) 234 F. 2d 615:

> "On writ of habeas corpus, DeCoster, apparently the most guilty one of the three, has since been discharged by the Seventh Circuit, Judge Finnegan dissenting. *DeCoster* v. *Madigan*, 7 Cir., 223 F. 2d 906."

The penalties for murder and attempted rape are set forth in the Table of Maximum Punishments, Manual for Courts-Martial, United States, 1951. At that time the penalty for murder was death or life imprisonment as a court-martial might direct and for attempted rape the penalty was any punishment that a court-martial might direct subject to a maximum limitation of twenty years imprisonment. Obviously, there is no minimum punishment for the latter offense and the sentence could conceivably be nothing.

At the conclusion of the trial and before the Court retired to deliberate on the punishment to be fixed, the Law Officer instructed the Court with respect to the penalty which could be imposed on the murder charge but he made no reference and said absolutely nothing with regard to the penalty which might be imposed for the conviction of attempted rape. (R. 27).

The sentence of the court-martial was that the petitioner should suffer, among other things, the penalty of life imprisonment (R. 27, 28). This action was approved and the record was duly forwarded to the Board of Review in the office of the Judge Advocate General of the Army. On January 15, 1952 the Board of Review reviewed and set aside the murder conviction for lack of evidence (R. 28). The Board of Review then took upon itself the authority to establish an appropriate sentence on the petitioner for the remaining conviction of attempted rape. It decided that twenty years imprisonment was appropriate (R. 29).

The powers and authority of the Board of Review are clearly defined and set out in Section 66 of the Uniform Code of Military Justice. Paragraph (c) of Section 66 states that the Board of Review

> ". . . shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence,

as it finds correct in law and fact and determine, on the basis of the entire record, should be approved."

Paragraph (d) of Section 66 further prescribes the procedure where the Board of Review sets aside the findings and sentence in the following language:

"If the Board of Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed."

In the instant case, the Law Officer gave no instructions to the court-martial with reference to the conviction for attempted rape. The alternative punishments for the conviction of murder were either death or life imprisonment. The court-martial elected the *minimum* sentence of life imprisonment on the petitioner. It is apparent from these circumstances that had the Court been instructed with regard to the conviction on attempted rape (and no charge of murder was involved), that it is certainly probable to assume that the court-martial would not have authorized the *maximum* sentence for attempted rape.

The argument made by the respondent takes the position that the court-martial could not have sentenced the petitioner for a term of life plus any number of years and therefore any instructions by the Law Officer relative to the sentence on the charge of attempted rape would have been superfluous. However, the absurdity of that

line of reasoning was rejected by the Court in *DeCoster v. Madigan, supra*, with the following comment at p. 910:

> "Of course, any suggestion that the court-martial should have sentenced plaintiff for a term of life plus twenty years would be ridiculous, but equally so is the assertion that the court-martial did or intended to impose any part of its sentence for attempted rape. It lacked even the necessary instructions upon which such award of punishment would have to be based. Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here under the statute, only the court-martial was authorized to take this step; it failed to do so."

It cannot be argued, as respondent attempts to do, that the Board of Review merely remitted the excessive portion of petitioner's sentence which became apparent after the disapproval of the conviction on the murder charge. It is illogical to assume that had the court-martial acquitted the petitioner on the murder charge but convicted him only on the charge of attempted rape that the court would have sentenced him to the maximum punishment of twenty years where the record discloses that with the conviction of two serious crimes the sentence imposed by the trial court was the minimum of two alternatives on the more severe offense.

Under the combination of these circumstances together with the statute defining the authority of the Board of Review, it is quite apparent that the Board of Review exceeded its power when it authorized the maximum prison sentence for the remaining conviction of attempted rape. Such action constituted an original imposition of sentence which is clearly beyond the power and authority of the Board of Review as said sentence was never considered

by the trial court since it had received no instructions with reference to that conviction and had made no decision regarding the sentence to be imposed thereon.

The respondent argues that court-martial procedure involves a gross sentence on all offenses for which the accused is convicted. However, it should be noted that a gross sentence is proper when the *sentencing authority refers to all* the crimes for which a defendant is convicted. The prevailing accepted concept of a gross sentence is that by its nature it imposes a single general sentence covering *all* the counts in an indictment as contrasted with a separate sentence imposed on each individual count in the indictment. The significant element of a gross sentence is that it must refer to *all* the counts on which an accused stands charged. In the instant case, the Law Officer instructed the trial court only as to the punishment on the conviction of murder and completely omitted any reference to the conviction of attempted rape. Consequently, the sentence returned by the Court-Martial had reference only to the murder conviction on which it was instructed.

Furthermore, the original sentence, it is significant to note, was the minimum of the alternatives permitted. The Board of Review has affixed as its determination of a proper sentence for the remaining conviction of attempted rape the maximum punishment for that offense. Yet, it has been held in the case of *United States* v. *Voorhees* (1954) 4 U.S.C.M.A. 509, that the resentence must not be arbitrarily severe, even though within the statutory maximum.

In *United States* v. *Voorhees*, supra, the accused was convicted of five violations of the Uniform Code of Military Justice which grew out of certain of his rights regarding his experiences in Korea. A divided Board of

Review set aside all of the findings of guilt except that relating to a single offense. However, it affirmed a sentence of dismissal and total forfeitures as appropriate for the single finding affirmed. The Court of Military Appeals, although divided in its opinion, were in complete accord in reversing the action of the Board of Review in taking upon itself to affirm the original sentence. The Court stated, at page 531:

> "Suffice it that the board of review seems either not to have been aware of the full extent of its powers or, as Judge Latimer suggests, it believed that it could not approve any lesser sentence. We all agree that further action should be taken with regard to the sentence. We further agree that, in view of the dismissal of all the major charges, the interests of justice will best be served by permitting a primary rather than a 'secondary and derivative' redetermination of the sentence. See *United States* v. *Brasher*, 2 U.S.C.M.A. 50, 6 C.R.M. 50.
>
> "For the foregoing reasons, the decision of the Board of Review is reversed and a rehearing is ordered on additional charge I."

Judge Latimer concurring in part and dissenting in part in the case of *United States* v. *Voorhees*, *supra*, stated at p. 542:

> "In *United States* v. *Brashear*, 2 U.S.C.M.A. 50, 52, 6 C.M.R. 50, we had occasion to make an observation which is singularly apt here:
>
> "In a special and peculiar sense the sentence of the law for adjudged misconduct—military or civilian—is the product of a trial court. It alone, of all agencies of the law, is authorized to 'adjudge' the law's penalty. True it is that review agencies are empowered to take

varying sorts of action with respect to this phase of the trial court's task, but their function in this particular is secondary and derivative. They merely 'approve' or 'disapprove', 'affirm' or 'reverse'. The trial court, on the other hand, 'imposes'—it determines as an original, a basic, and a primary proposition."

Judge Latimer then pointed out that the Court of Military Appeals in the usual situation would be powerless to interfere with a sentence affirmed by the Board of Review. He described the procedure that should be followed where the Board of Review has reversed the findings of the court-martial. He said, at page 543:

"One other avenue remained open to the board of review to correct any inequities in this litigation. A rehearing before the court-martial could have been ordered to permit a sentence to be adjudged in the light of the offense committed, if a finding of guilty on the one specification resulted. The board of review elected not to pursue that method and . . . I feel the board of review thereby abused its discretion. On previous occasions when redetermination of the appropriateness of the sentence became necessary, we have been content to remand the case to a board of review for reassessment. This we have done because remand to the trial forum is seldom necessary to achieve a fair and just determination of the sentence. But that is in no way saying that such a proceeding may not be adopted when the only choice left to a board of review is to affirm the sentence or free an accused. That we have previously sought to get clear. *United States* v. *Keith, supra.*"

In noting the similarities between the instant case and *United States* v. *Voorhees, supra*, we quote from the opin-

ion of Judge Latimer wherein he made the following observations at p. 543:

> "Moreover, the board of review could not compensate by a reduction in sentence for those findings it reversed, had it been prone to adopt that procedure. Under those circumstances, a rehearing by the court-martial was not only appropriate, but to my mind, it was mandatory."

It should be noted that the opinion in *United States* v. *Voorhees, supra,* was rendered some two and a half years after the Board of Review acted in the instant case. Yet, even at that date it appeared to the United States Court of Military Appeals that the Board of Review was not aware of its powers as indicated by Judge Latimer's comments at page 543:

> "First, I am not certain the Board of Review was cognizant of the fact it had the power to grant a rehearing where the only vice in the record infested the sentence . . . I do not believe, however, that Congress intended the military judicial system should be without power, in its own sphere, to correct an obvious miscarriage of justice even if it runs only to a sentence. In a fixed sentence, field corrective measures are non-existent so that a rehearing must be considered as an appropriate method of correcting an obviously unfair sentence."

Again reference is made to the opinion of the *United States* v. *Voorhees, supra,* where the Court under similar circumstances as here involved set out the procedure that should be followed in a situation such as we have in the instant case. At page 543, the Court said:

> " . . . having no power to change the type or nature of the sentence, and being precluded from making

the punishment fit the crime, the board should have refused to pass on the appropriateness of the sentence until some military judicial body with the authority to consider all forms of sentence should have had an opportunity to fix a reasonable sentence."

In the instant case where the maximum punishment for the conviction of murder was death and the maximum punishment for the conviction of attempted rape was twenty years, the obvious disparity in these two crimes should be taken into consideration should the Board of Review reverse a finding of guilt on the conviction of murder. It is interesting to note that the opinion in *United States* v. *Voorhees, supra,* considered a similar situation and also made reference to the fact that the Board of Review, by law, had the power to reverse findings but was prohibited from resentencing the accused. The Court stated, at page 544:

"But when what remains is but an insignificant part of the original, justice and a fair trial demand some tailoring of the punishment imposed by the court-martial. When, by law, the body with power to reverse findings is precluded from adjusting a sentence so as to make it appropriate to the conviction, one method of correcting the wrong is by the grant of a rehearing. Here the board of review chose not to follow that course which, under the peculiar facts of this case and the limitations placed on boards of review, is to me against logic, reason and justice. The decision fails to disclose the exercise of a sound, legal discretion in the light of the entire record.

" . . . The extent to which I go is that the final sentence will be determined by some judicial body which is not shackeled so tightly it does not have a free choice of an appropriate sentence."

The Board of Review did not *reduce* the original sentence to twenty years imprisonment as claimed by the respondent. The Board of Review did not "affirm such part or amount of the sentence," that it determined should be approved in accordance with its authority (Section 66). As a result of the reversal as to the finding of guilty on the charge of premeditated murder, the Board of Review was faced with the obvious fact that the original minimum sentence of life imprisonment, which was mandatory for conviction on murder, was now improper since the finding of guilt was reversed. Therefore, there was no valid sentence to be reduced.

The Board of Review took upon itself to exercise independent judgment as to the appropriate sentence on its modified findings and the result was an original imposition of sentence that was never considered by the court-martial. This action, we respectfully submit, was not a reduction of the term of the original sentence nor the remission of the excessive portion of the sentence. To arbitrarily establish the maximum punishment for the one remaining finding of guilt was a clear imposition of an original sentence which is beyond the authority of the Board as defined in Section 66 of the Uniform Code of Military Justice.

The only basis suggested by the respondent for supporting the action of the Board of Review is that this practice regarding sentencing is a characteristic feature of reviewing court-martials and that this construction comports with military understanding and procedure in uncounted numbers of cases over a long period of the history of military justice. The mere fact that such practice has been prevalent in countless numbers of cases over a long period of time does not develop a sense of righteousness to something that is consistently improper. Two wrongs do not make a right. If the military authorities require such

procedure, which they insist is necessary for the expeditious administration of military justice, they should request legislative approval from Congress to modify or amend Section 66 of the Uniform Code of Military Justice so that they would have the proper authority to act in the manner which they feel is necessary.

Finally, with regard to the Government's contention that if the case were sent back to the trial court for a rehearing on the sentence, the original members of the trial court might be dispersed to different sections of the world so that it would be exceedingly difficult if not impossible to have the same court resentence the accused, we wish to refer to the comments of Judge Finnegan in his dissenting opinion in the case of *DeCoster* v. *Madigan, supra*, at page 914, wherein he pointed out that under such circumstances the case did not have to be returned to the identical general court-martial.

Any other interpretation of Section 66 of the Uniform Code of Military Justice would concentrate too much power in the Board of Review. Under the respondent's contentions it has the power to affirm or reverse findings of guilt and to affirm sentences "as it finds correct in law and fact and determine on the basis of the entire record should be approved". That conclusion is certainly not within the legislative intent as enacted by Congress. Under that theory the result would be the combination of judge, jury and hangman within the same individual body. This concept of justice is completely revolting to our ideals of law—military or civilian.

The entire issue involved herein was clearly and succintly summarized in the district court's order (R. 22, 23) granting the petitioner's writ of habeas corpus. The order stated:

> "Under the record of the military court it appears he should be punished, but it is not for his Court on